No. 82-1289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE CHICAGO HOUSING AUTHORITY,
Petitioner,

v.

DOROTHY GAUTREAUX, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below properly ruled that this case was pending on October 19, 1976, the effective date of the Civil Rights Attorney's Fees Award Act of 1976, 42 USC § 1988, when on that date the case—including particularly the nature of the remedy—was in active controversy and no prior judgment had finally disposed of all foregoing issues.

2. Whether, pursuant to a motion for fees from which time spent on "unsuccessful aspects" of plaintiffs' case had been excluded, the courts below properly awarded plaintiffs, as prevailing parties, attorney's fees for all time reasonably expended on matters as to which plaintiffs were determined to have prevailed.

3. Whether the courts below properly ruled that plaintiffs' motion for fees was timely filed when the motion sought fees *pendente lite*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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The Questions Presented and Statement of the Case are misleadingly presented in the petition for certiorari. We therefore restate the Questions Presented at page i above, and supplement the Statement of the Case as follows:

SUPPLEMENT TO STATEMENT OF THE CASE

In February 1969 the district court granted plaintiffs' motion for summary judgment on Count I of the complaint against the defendant, Chicago Housing Authority ("CHA"), but denied cross motions for summary judgment on Count II.

296 F. Supp. 907, 914-15.[1] Count II alleges liability under Section 601 of Title VI of the Civil Rights Act of 1964 (42 USC § 2000d) and seeks injunctive relief respecting the use of federal funds. It has never been disposed of. (The 1969 ruling denied summary judgment on Count II "without precluding plaintiffs from showing on the basis of more facts" that such injunctive relief should be granted. 296 F. Supp. at 915.)

Following entry of a remedial order on Count I, 304 F. Supp. 736, 737, the district court directed the parties "to formulate a comprehensive plan to remedy the past effects of unconstitutional site selection procedures in the public housing system in the City of Chicago . . .," and to consider alternatives, not confined to Chicago, to provide "full relief." (R. 168.) Thereafter, plaintiffs submitted their proposed final judgment order to provide "full equitable relief" against both CHA and defendant United States Department of Housing and Urban Development ("HUD").[2] The district court then scheduled a hearing to consider "comprehensive relief," and directed "all parties" to file "amended proposed final judgment orders." (R. 292.)

Prior to a ruling on their proposed final judgment order, in January 1973 plaintiffs moved the district court to consider a metropolitan plan for relief against both CHA and HUD. (R.

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[1] Counts III and IV had been dismissed in 1967. 265 F. Supp. 582.

[2] Plaintiffs' Memorandum Supporting proposed final judgment order at 6. Plaintiffs' proposed final judgment order and supporting memorandum were not bound into the record by the district court clerk. They appear as the entry for 9/5/72 on p. 2 of 4 pages listing documents transmitted under separate certificate.

The consolidated case below was begun in 1966 as two cases, one against CHA (66 C 1459) and one against HUD (66 C 1460), with "virtually identical" substantive issues. (Order of June 19, 1967, R. 41 on 66 C 1460 docket sheets.) Following the determination of HUD's liability, 448 F. 2d 731, the cases were consolidated on November 26, 1971. (R. 100 on 66 C 1460 docket sheets.)

301.) CHA and HUD opposed this motion (R. 317, 318) and the district court denied the request. 363 F. Supp. 690. On appeal, with both CHA and HUD urging affirmance, the Court of Appeals reversed and remanded for consideration of a comprehensive metropolitan remedial plan to remedy "CHA's and HUD's" past wrongs. 503 F. 2d 930, 939 (7th Cir. 1974).[3] In April, 1976, this Court affirmed and remanded to the district court. 425 U. S. 284 (1976).

On October 19, 1976, the effective date of the Civil Rights Attorney's Fees Awards Act, the subject matter of the remand—consideration of comprehensive relief against CHA and HUD—was pending before the district court and had not been disposed of. Such relief has only recently been ordered with respect to HUD, 523 F. Supp. 665, aff'd. 690 F. 2d 616, except as to one continuing matter, 524 F. Supp. 56. Comprehensive relief with respect to CHA has yet to be resolved by the district court.

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[3] Following the reversal plaintiffs sought and were granted leave to file their Second Supplemental Complaint seeking participation of several other parties in the development and implementation of a comprehensive metropolitan remedy against CHA and HUD. (R. 326.) CHA's Answer was filed in March, 1975. (R. 333.) The issues thus raised have been continued generally (R. 374) and—like Count II of the initial complaint against CHA—are also still undisposed of.

ARGUMENT

CHA's contentions that this case was not "pending" in 1976, that plaintiffs did not prevail in some respects, and that this case presents an issue of timeliness, all rest not on any issue of law but on CHA's erroneous view of the facts of this case—namely, its "continued mischaracterization of this case as many separate matters." App. at 40a. The courts below properly rejected this view of the facts.

This case has been in "continuous litigation" since its inception. 498 F. Supp. 1072, 1073 (1980); App. at 39a. The initial remedial order of July 1, 1969 was "final in the sense that it was appealable and that it established liability," App. at 39a, but it did not purport finally to "dispose of all foregoing issues." *Northcross* v. *Board of Educ.*, 611 F. 2d 624, 635 (6th Cir. 1979), *cert. denied*, 447 U. S. 911 (1980). On the contrary, it deferred judgment on Count II of plaintiffs' complaint against CHA and "expressly contemplated" continuing judicial proceedings. App. at 39a. Among other such proceedings, the court subsequently ordered the parties to submit "proposed final judgment orders" embodying "comprehensive relief" (R. 292) which has not yet been provided as to CHA. As the Court of Appeals stated in this regard, "relief was still being formulated in 1976 . . ." App. at 14a. Thus the courts below properly concluded that CHA's "premise, that the 1969 order was final and all other matters were supplemental, simply cannot be accepted." App. at 38a.

I.

THERE IS NO CONFLICT WITH A SO-CALLED "FIFTH CIRCUIT TEST" OR WITH CONGRESSIONAL INTENT.

CHA's initial argument rests on a mischaracterization not only of the facts of this case but of the Court of Appeals opinion as well.

As to the facts, CHA's petition reasserts its thrice-rejected argument that the entire history of this case since 1969 has "dealt exclusively with the implementation" of a fixed 1969 remedial order (pet. at 11-12) by means of "supplemental" enforcement proceedings (*id.* at 12) that "did not concentrate on . . . the appropriate contours of the remedy" (*id.* at 11).

However, the nature of the remedy against CHA has been in continuous litigation and is today not finally resolved. Though the 1969 order against CHA was final in the sense of being appealable, it expressly contemplated "continuing judicial proceedings that would involve active controversy." App. at 39a. In 1971 the district court ordered the parties to formulate a "comprehensive plan" for "full relief." (R. 168.) Plaintiffs then submitted a "proposed Final Judgment Order" seeking such relief against both CHA and HUD. (Entry of 9/5/72, page 2 of 4 pages listing documents transmitted by the district court clerk to the clerk of the Court of Appeals for the Seventh Circuit under separate certificate.) The district court thereupon scheduled a hearing to consider "comprehensive relief," and directed all parties to file "amended proposed final judgment orders." (R. 292.) On plaintiffs' appeal from a 1973 ruling with respect to the geographic scope of that comprehensive relief, and over the opposition of both CHA and HUD, the Court of Appeals reversed and remanded for consideration of a "comprehensive metropolitan" remedy for "CHA's and HUD's" past wrongs. 503 F. 2d 930, 939 (1974). In April 1976 this Court affirmed and remanded, noting that, "Both CHA and HUD have the authority to operate outside the Chicago city limits." The Court also said, "[I]t is entirely appropriate . . . to order CHA and HUD to attempt to create housing alternatives . . . in the Chicago suburbs." 425 U. S. 284, at 298-99 (1976) (footnote omitted).

Thus, the district court orders of 1971 and 1972, the 1974 remanding order of the Court of Appeals and this Court's ruling of 1976, show plainly that none of those courts viewed the

remedy against CHA as having been "fixed" or "closed" years earlier.[4] The Court of Appeals was therefore clearly correct in determining that in 1976 "substantive issues remained open and unresolved," including among others "the scope of possible remedy," App. at 10a, and that these pending issues "have been central to the merits, not suppositious" (*id.* at 16a).[5]

CHA likewise mischaracterizes the opinion of the Court of Appeals. It says that that Court adopted "a test that focuses on full implementation of the remedy" (pet. at 7) and held that "a civil rights case is not 'over' for purposes of awarding fees until the remedy has been fully implemented . . ." (*id.* at 8). However, this ignores and is inconsistent with the Court of Appeal's

[4] The inference drawn by the dissent in the Court of Appeals that there was no contemplation of change in the remedy in 1971 is thus not supported by the record. The actual orders entered in subsequent years by three different courts make it plain that the nature of the remedy against both CHA and HUD remained in active litigation.

The dissent's view appears to rest in part on plaintiffs' exclusion from their fee computation of hours relating to HUD. App. at 26a-27a. Surely this is to draw an unjustified inference. To strip their request down to an uncontestable figure and avoid any conceivable claim of duplication, plaintiffs excluded many categories of hours, including for example the hours of all attorneys other than lead counsel, even though such hours unquestionably related solely to CHA. App. at 21a.

[5] As the Court of Appeals thus recognized, and as CHA implicitly concedes by arguing repeatedly that the nature of the remedy was closed in 1969, the so-called Fifth Circuit test of a pending "substantive" issue does not require a pending issue of *liability;* such substantive issues as the nature of the remedy suffice. *See, e.g., David* v. *Travisono,* 621 F. 2d 464, 467 (1st Cir. 1980) (request for appointment of ombudsman); *Bolden* v. *Pennsylvania State Police,* 491 F. Supp. 958, 961 (E. D. Pa. 1980) (development of nondiscriminatory employment standards). Even a pending issue of attorney's fees suffices to make the entire case "pending." *E.g., Bond* v. *Stanton,* 555 F. 2d 172 (7th Cir. 1977), *cert. denied,* 438 U. S. 916 (1978). In any event, liability issues were pending here in 1976, i.e., CHA's liability under Count II of the original complaint, and all of the issues raised by the Second Supplemental Complaint.

determination that "relief was still being formulated in 1976" (App. at 14a), and that in April 1976 "the entire suit came back to the district court in a new posture" (*id.* at 8a) that thereafter involved litigation dealing with, among other things, a metropolitan remedy against CHA (*id.* at 9a, n. 14). It is also contrary to the Court of Appeals' express statement that, "*Quite apart from the dearth of remedial action,* the scope of possible remedy had changed" (*id.* at 10a, emphasis supplied). Thus it is simply incorrect to attribute to the Court of Appeals the adoption of the rule or test CHA would formulate for it.[6]

When one thus examines what the Court of Appeals has actually *said* in this case (consistently with the view of the facts of the case adopted by both courts below), it is apparent that the Court has *not* held that a civil rights case is not over for fee purposes "until the remedy has been fully implemented . . ." (pet. at 8). Rather, the Court has properly held that where the nature of the remedy has not been settled but is in continuous, active litigation at the time the Civil Rights Attorneys' Fee Award Act was passed, the entire case is "pending" on that date for purposes of applying the Act. In other words, the

[6] In a footnote (pet. at 11, n. 5) CHA attempts to divorce itself from all of this post-1969 litigation concerning the nature and scope of the comprehensive remedy to be prescribed in this case, depicting its role as participation in proceedings solely with respect to remedies against HUD. CHA's argument on this point was termed "disingenuous" by the Court of Appeals (App. at 7a; *see also* pp. 6a-9a and nn. 12 and 14). CHA's objection (pet. at 12, n. 5) that the pendency of metropolitan remedial proceedings against HUD and CHA was not explicitly relied upon in the district court is of no moment. "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge* v. *Williams,* 397 U. S. 471, 475 n. 6 (1970). CHA's contention that there is no factual basis for the determination of the Court of Appeals in this regard (pet. at 12, n. 5) flies in the face of various portions of the record specifically referred to in the Court's opinion. See, e.g., App. at 9a, n. 14.

opinion rests upon the (correct) proposition that for fee award purposes a civil rights case is not over so long as the nature of the remedy (not merely its implementation) is still being litigated. There is no doubt under the decided cases that such a determination is consistent with the Congressional intent behind the Act.[7]

II.

NO ISSUE OF PROPORTIONING FEE AWARDS IS RAISED.

CHA's contention that this case raises an issue of "whether an award of attorneys' fees under § 1988 should be proportioned to reflect the extent to which a plaintiff has prevailed . . ." (pet. at 14-15), ignores factual determinations of the district court.

CHA's petition principally refers in this respect to two matters—the appointment of a receiver and the reference to a

[7] Attempting to conjure a conflict between circuits CHA says, "The Seventh Circuit's position is wholly contrary to . . . the Fifth Circuit test" (pet. at 14). Yet CHA's petition for rehearing in the Seventh Circuit expressly acknowledged (p. 3), "The parties and all the judges who have considered the issue agree that the proper test" is—as CHA terms it—the Fifth Circuit test. Thus, despite CHA's rhetorical assertion of a "new" Seventh Circuit "test" and a resulting "conflict" among the circuits, CHA is really objecting to the Seventh Circuit's application of the so-called Fifth Circuit test to the facts of this case, an objection that rests on mischaracterizing this case as a series of separate, discrete matters. But even if CHA were correct in "mischaracteriz[ing] this case as a series of separate matters instead of recognizing it as continuous litigation" (App. at 16a), this factual dispute would not present a conflict among circuits. Indeed, the Seventh Circuit opinion (App. at 4a) employs a formulation of the test for "pending" used not only in the Fifth Circuit, but in the First and Sixth as well. See, *David* v. *Travisono*, 612 F. 2d 464, 466-68 (1st Cir. 1980) (*per curiam*), *Northcross* v. *Board of Education*, 611 F. 2d 624, 633-34 (6th Cir. 1979), *cert. denied*, 447 U. S. 911 (1980).

Master. Plaintiffs' pursuit of both matters was determined to have contributed in a substantial way to remedial progress.

> "Here, plaintiffs' pursuit of the proceedings before the Master, the 1979 order and the motion to appoint a receiver undoubtedly contributed in a substantial way to CHA starting to provide housing in compliance with the court's orders. Moreover, those pursuits were unquestionably a material factor in bringing about changes in defendants' conduct, especially since the motion for appointment of a receiver was denied without prejudice to renew. That motion was a substantial factor in compelling the CHA to show demonstrable progress." (App. at 41a.)[8]

Moreover, as the Court of Appeals noted, time spent on "unsuccessful aspects of plaintiffs' case" was excluded from the fee petition. App. 2a, n. 2.

Accordingly, even if this Court were to disagree with the Seventh Circuit's view that prevailing plaintiffs are entitled to fees for all time reasonably expended on the case unless the positions asserted are frivolous or in bad faith, *Sherkow* v. *State of Wisconsin*, 630 F. 2d 498, 504 (7th Cir. 1980), no issue of proportioning fee awards would be presented by the record in this case.

III.

NO TIMELINESS ISSUE IS PRESENTED.

CHA's timeliness argument also rests on CHA's mischaracterization of the Court of Appeals' opinion: "... *because the remedy had not yet been fully implemented*, the Seventh Circuit held that fees had been appropriately awarded '*pendente lite*'" (pet. at 16, emphasis added to the initial

[8] Cf. *Stewart* v. *Hannon*, 675 F. 2d 846, 851 (7th Cir. 1982): "Whether benefits flowed from the litigation and whether the litigation was a material factor in producing benefits are fact questions to be determined by the district court."

clause). If this statement is corrected to reflect the actual holding—fees were properly awarded *pendente lite* because the nature of the remedy was still in litigation—any timeliness argument vanishes.[9]

CHA also asserts that the decision below is "squarely opposed" (pet. at 17) to *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 454 n. 17 (1982). *White* holds that the 10-day time limit of Rule 59(e) of the Federal Rules of Civil Procedure does not apply to fee petitions under 42 USC § 1988, while noting that district courts remain free to impose timeliness standards and to deny requests filed with "unreasonable tardiness." *Id.* at 454 and n. 17. Here, as the Court of Appeals made clear, no tardiness standard is in issue because "these fees are being sought *pendente lite*, *Hanrahan* v. *Hampton*, 446 U. S. 754, . . . the event that triggers" a time limit "has not yet occurred," and the motion for fees is, if anything, "early rather than late." App. at 19a-20a.

CHA notes (pet. at 17) that, in his concurring opinion in *White*, Mr. Justice Blackmun said this Court had come "close to approving" the Eighth Circuit view that a motion for fees ought to be filed within a short time fixed by local rule. CHA then argues that for such a time limit to have any meaning at all, "a reasonable rule must be adopted to fix the point at which the time limit begins to run." (*Id.*) Though CHA's petition does not say what that point should be, CHA argued to the Court of Appeals that the time for filing fee requests should begin to run following "each order entered in the case." App. 18a.

CHA's position, not the Seventh Circuit ruling, is inconsistent with this Court's rationale in *White*. The *White* opinion

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[9] Thus, instead of CHA's feared result that fees will be awardable "so long as some element of the remedy has not yet been implemented" (pet. at 17), one may substitute the correct view that a case remains pending and fees may be awarded *pendente lite* so long as the nature of the remedy is still being litigated.

reasoned that to apply the Rule 59(e) time limit to civil rights attorney's fees requests could "yield harsh and unintended consequences." 455 U. S. at 452. "In civil rights actions, especially in those involving 'relief of an injunctive nature that must prove its efficacy only over a period of time,' this Court has recognized that 'many final orders may issue in the court of the litigation.' " *Id.* (citation omitted). In such a case, requiring counsel to file fee requests in conjunction with "each 'final' order" would serve "no useful purpose" and "could generate increased litigation of fee questions—a result ironically at odds with the claim that it would promote judicial economy." *Id.* That reasoning would of course apply as well to CHA's proposal that a short time period for fee requests begin to run after each final order is entered.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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